Supreme Court, U. S.
FILED
OCT 6 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-531

* * *

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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August 1975

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* * * *

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TEXAS STATE BOARD OF
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* * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * *

Petitioner, the Texas State Board of Public Accountancy, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this proceeding:

JUDGMENT BELOW

The judgment of the United States Court of Appeals was issued without an opinion and therefore

there is no recorded opinion to attach. The judgment, as received by Petitioner, is attached as Exhibit A to this petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit is undated but shows to have been filed with that Court on August 11, 1975. No rehearing has been sought. No extension of time within which to petition for certiorari has been sought. This petition is filed within ninety days of the date of the judgment as required by 28 U.S.C. Section 2101(c).

This Court has jurisdiction of this cause under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas State Board of Public Accountancy, an agency of the State of Texas, is immune from prosecution under the antitrust laws of the United States.

2. Whether a State, immune from prosecution under the antitrust laws of the United States, may nevertheless be subjected to a civil investigative demand under 15 U.S.C. Section 1311, et seq.

3. Whether the United States District Court correctly undertook to determine the immunity of the State of Texas and the Texas State Board of Public Accountancy from prosecution under the antitrust laws prior to enforcement of the civil investigative demand.

4. Whether the decision of the United States Court of Appeals conflicts with and is contrary to the decision of the United States Supreme Court in Parker v. Brown, 317 U.S. 341 (1943).

5. Whether the United States Court of Appeals erred in determining this case on its merits without first affording the State of Texas and the Texas State Board of Accountancy an opportunity to file a brief.

6. Whether the United States Court of Appeals acted unreasonably in giving the State of Texas and the Texas State Board of Public Accountancy insufficient time to adequately respond to the motion of the United States for summary reversal.

7. Whether the United States Court of Appeals acted unreasonably in placing the case on the summary calendar and disposing of it on the merits without giving the State of Texas or the Texas State Board of Public Accountancy notice, contrary to Rule 18 of the local rules of the United States Court of Appeals for the Fifth Circuit.

STATUTES INVOLVED

The statutes governing the issuance of a civil investigative demand are Sections 1311 through 1314 of Title 15 of the United States Code. These provisions are lengthy and are set out verbatim as Appendix B to this petition.

The Public Accountancy Act of 1945 of the State of Texas, article 41a of the Revised Civil Statutes of

the State of Texas, is set out verbatim as Exhibit C.

The local rules of the United States Court of Appeals for the Fifth Circuit are published under Title 28 of the United States Code. Rule 18, added in December of 1968 (1975 Supplement), is as follows:

Rule 18, Summary Calendar

> (a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.
>
> (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.
>
> (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

STATEMENT OF THE CASE

On or about November 29, 1974, the Antitrust Division of the United States Department of Justice issued Civil Investigative Demand No. 1597 addressed to the Texas State Board of Public Accountancy. The complete demand is attached hereto as

Exhibit D. The stated purpose of the demand was to ascertain

> "whether there is or has been a violation of the provisions of Title 15, United States Code, Secs. 1 by conduct of the following nature: Agreements to restrain interstate trade and commerce in the sale of accounting services.
>
> "You are a person under investigation and are hereby required to produce, to make available for inspection and copying or reproduction, and to deliver to a custodian named herein at your principal place of business designated above, the documentary material in your possession, custody or control described on the attached schedule . . ." (Emphasis supplied.)

The demand was served on the State of Texas and the Texas State Board of Public Accountancy on December 3, 1974.

Thereafter, on December 23, 1974, the Texas State Board of Public Accountancy filed its complaint pursuant to section 1314(b) of Title 15 of the United States Code stating that it was not a person within the meaning of the statute and that it was immune from prosecution under the antitrust laws of the United States and praying that the demand be set aside and held for naught. Thereafter, the United States filed an answer to the complaint and a counterclaim asking that the Board of Accountancy be

compelled to comply with the demand. Subsequently, the United States filed, as a separate instrument, a petition for enforcement of the demand.

The case was tried before the District Court on its merits on April 11 and, after both parties had filed extensive briefs and had presented oral argument to the court, the United States District Court, on April 16, 1975, rendered its memorandum opinion and order, a copy of which is attached hereto as Exhibit E, finding the Texas State Board of Public Accountancy to be immune from the Sherman Act pursuant to Parker v. Brown, 317 U.S. 341 (1943), as a matter of law, and thus exempt from being considered "a person under investigation" within the scope of 15 U.S.C. Section 1312(a). The Court ordered, adjudged and decreed that the demand be set aside and held for naught and the petition of the United States for enforcement of the demand was denied.

Within due time, on or about June 12, 1975, the United States gave notice of appeal. The record on appeal was filed in the United States Court of Appeals on July 24, 1975.

On July 30, 1975, a Wednesday, a notiee was received from the United States Court of Appeals that the motion of the United States to postpone submission of its brief and a separate motion for summary reversal had been received and filed on July 28, 1975, and that "under the rules and practice of this Court will be presented for ruling without oral argument on the date * shown in column (2) above together with any response or opposition that

may be filed by opposing counsel by that date." (Emphasis added.) The date shown was August 4, 1975, a Monday, five days after the receipt of the notice.

On July 31, 1975, counsel for the Texas State Board of Public Accountancy forwarded to the Court a response to the motion for summary reversal.

At no time have briefs been filed. Neither the State of Texas nor its Attorney General has ever been notified that this case was placed on the summary calendar. The only communication received in response to either motion was the order, which is attached as Exhibit A.

The United States District Court had jurisdiction of this cause under 15 U.S.C. Section 1314(d).

ARGUMENT

The United States District Court, in granting the relief sought by the State of Texas, reviewed the facts, finding:

> The Texas State Board of Public Accountancy is created by statute as an independent State regulatory agency whose members are appointed by the Governor, with the advice and consent of the Senate. TEX. REV. CIV. STAT. ANN. art. 41a, Section 4. Each member must take a constitutional oath of office. TEX. CONST. art. XVI, Section 1. The Governor may require that any Board member

give written information, under oath, on any subject relating to his official responsibilities. TEX. CONST. art. IV, Section 24. The Board is statutorily authorized to promulgate rules of professional conduct, with the approval of a majority of licensed public accountants TEX. REV. CIV. STAT. ANN. art. 41a, Section 5. The Board licenses, registers, examines and generally regulates the professional practices of certified public accountants and public accountants in Texas. The Board may revoke or suspend a certificate or permit after notice and hearing. Id., Section 22. The Board may hold hearings, issue subpoenas to compel the attendance of witnesses and the production of documents, administer oaths, take testimony, hear proofs, and receive exhibits in evidence in connection with any such hearing. The Board may invoke the aid of any court of the State in requiring the attendance and testimony of witnesses and the production of documentary evidence. Decisions of the Board are reviewable in the district courts of Texas. Id., Section 23. The Board may apply in the district courts of Texas for an injunction enjoining the practice of public accountancy by any unauthorized person. Id., 24.

Citing Parker v. Brown, 317 U.S. 341 (1943), the Court concluded that the actions of the Board derived their authority and efficacy from the legislative command of the State. It found immunity; that the immunity of the Board was established as a matter of law, and that nothing might be discovered through enforcement of the demand that could alter the fact that the acts of the Board were the acts of a sovereign to which the Sherman Act did not apply. It found that the Texas State Board of Public Accountancy was an arm of the State with the rights, privileges and immunities attendant thereto.

The Court's memorandum opinion and order (Appendix E) suffices as findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure. Surely the findings are not "clearly erroneous"; the United States has never asserted that they are and the Court of Appeals has not so found. Therefore, they are binding both on the Court of Appeals and upon this Court.

The United States has never filed a brief. It has never stated the issues presented on appeal as it would have been required to do by Rule 28, Federal Rules of Appellate Procedure, had it filed a brief. It did, however, divide its argument before the United States Court of Appeals in support of its motion for summary reversal into two parts. The first of these was that: "Claims of immunity from the Sherman Act cannot be adjudicated in an action to enforce a CID." The argument made under this point was that the courts traditionally refuse to adjudicate claims of immunity from regulatory provisions in actions brought to enforce administrative subpoenas.

The United States, in making that argument, completely ignored the provisions of subsections (b) and (d) of section 1314 of Title 15 of the United States Code. While the general rule urged by the United States may be one applicable in the absence of specific statute, here the Congress has provided a means by which a party, claiming an immunity under the antitrust laws, may challenge the propriety of a civil investigative demand. Surely it cannot be the holding of the Court of Appeals or of this Court that, despite the specific language of the statute, the United States District Court lacked authority to look into "any constitutional or other legal right or privilege" of the State of Texas and the Texas State Board of Public Accountancy to have the demand set aside.

The second point urged by the United States was: "The government has a reasonable basis for believing that the Board has violated and is not immune from the Sherman Act." For argument under that point the United States recognized Parker v. Brown, supra, but attempted to urge that there were "at least two separate, but interrelated, grounds upon which the Board, even though established under state law, may be held to have no immunity under the Parker 'exemption' from application of the Sherman Act." The first of these asserted grounds was based upon this Court's recent decision in Goldfarb v. Virginia State Bar, 43 U.S.L.W. 4723 (June 16, 1975), and asserted that that decision demonstrated that quasi-official professional organizations under the guise of self-regulation are not free to engage in anticompetitive conduct. The second, relying on Goldfarb and Gibson v. Berryhill, 411 U.S. 564

(1973), asserted that, because any rule adopted by the Board required approval of a majority of accountants, the conduct incorporated in or required by the rule would not be immune from federal regulation.

In Parker v. Brown, supra, suit was brought to enjoin the California Director of Agriculture, Raisin Proration Zone No. 1, and others, from enforcing a raisin marketing act. The act in question authorized the establishment of programs for marketing agriculture commodities so as to restrict competition and maintain prices. It authorized the creation of an Advisory Commission of nine members, one of them being the State Director of Agriculture and the other eight being appointed by the Governor and confirmed by the Senate. Following a rather involved procedure, a Program Committee was then to be appointed to formulate a proration marketing program for the commodity produced in the zone. The proposed program was to be voted upon by the producers in the zone and, if sixty percent of the producers consented to it, it was to be instituted. The court, in holding the Sherman Act inapplicable to the program, stated:

> ". . . /I/t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which

suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress."
(317 U.S. at 350-351)

". . . It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . ."
(317 U.S. at 352)

The Sherman Act (15 U.S.C. Section 1, et seq.) in its general provisions provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared illegal."

As the Court, in Parker v. Brown, supra, stated:

"The State in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. . . ."

(317 U.S. at 352)

The similarity between the Commission in the Parker case and the Board of Accountancy is remarkable. The members of the Board are appointed by the Governor with the advice and consent of the Senate. (Article 41a, section 4, Vernon's Texas Civil Statutes) The Board is authorized to promulgate rules of professional conduct "appropriate to establish and maintain a high standard of integrity in the profession of public accountancy." (Article 41a, section 5, Vernon's Texas Civil Statutes) Such rules are to be voted on by public accountants holding valid permits under the Act. (Article 41a, section 5, Vernon's Texas Civil Statutes) In addition, the Board certifies persons as public accountants (Sections 12 and 13, article 41a, Vernon's Texas Civil Statutes) and it is illegal to practice as such without the certification (Article 41a, section 8, Vernon's Texas Civil Statutes).

Like the District Court, we can find no basis for differentiating the Parker case and for saying that the holding of that case does not apply here.

In Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit had occasion to consider the Parker decision and its application to an agency of the State of Texas in a private antitrust action brought against the University Interscholastic League. There, holding the UIL to be a state agency, that court said:

> ". . . /T/he /University Intershcolastic League/clearly is imbued with ample characteristics to warrant the trial court's determination that the organization is an agency of the State of Texas. The UIL is organized and administered annually as part of the Division of Extension of the /University of Texas at Austin/. . .; its administrative authority, the State Executive Committee, is appointed by the President of the University; its employees are employed and paid by the University; its office space and support facilities are provided by the University; its budget is prepared by the Director of Extension and approved by the University officials; and its funds are controlled by the University Bursar and are subject to the University's bookkeeping and accounting system."
> (487 F.2d 1026, 1028)

From these facts it was concluded that the UIL "constitutes a governmental entity outside the ambit of the Sherman Act." (487 F.2d at 1028)

In a more recent decision, the United States Court of Appeals for the Ninth Circuit in State of New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974), held that a state was not a "person" that could be sued under sections 1 and 2 of the Sherman Act which applies only to "persons".

In Goldfarb, as this Court so carefully pointed out, the sovereign power of the State of Virginia to regulate the practice of law was vested by its legislature in its Supreme Court, not in its State Bar. Recognizing that the threshold inquiry, in determining whether or not anticompetitive activity was state action of a type the Sherman Act was not meant to proscribe, was whether the activity was required by the State acting as sovereign, the Court stated:

> ". . . It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."
> (32 L.W. at 4729)

In so holding, the Supreme Court used language which is certainly subject to the interpretation that, had the anticompetitive action in question been that of the Supreme Court directly charged by the legislature with the responsibility of regulating the legal profession, the decision would have been different. It said:

> ". . . Here we need not inquire further into the state action question

because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complimented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. . . ."
(43 L.W. at 4729)

Surely Gibson v. Berryhill, supra, offers no assistance to the United States in this situation. It did not involve the validity of rules of the Alabama Board of Optometry, generally, but held that the Board's action directed specifically against "employed" optometrists, denied them due process.

Because the motion for summary reversal fails to state any points in issue and the order of

the Court of Appeals fails to state any reasons for its determination, we cannot be certain of the grounds for that order. It would appear, however, that at the very least, the United States Court of Appeals either ignored 28 U.S.C. Section 1314(b), the applicable statute, and held, as the United States urged, that the district court lacked jurisdiction to consider the immunity of the State of Texas and its Board of Accountancy or it ignored this Court's decision in Parker v. Brown and held that the State and its Board were not immune. In either event, it erred and its order should be reversed.

We acknowledge that the State of Texas is not a "person" within the meaning of the Fifth Amendment to the United States Constitution and is not entitled to the guarantee of due process. State of South Carolina v. Katzenbach, 383 U.S. 301 (1966). On the other hand, both incorporated and unincorporated associations are entitled to a modicum of due process. United States v. Morton Salt Company, 338 U.S. 632, 651-652 (1950).

Thus it would appear that the United States and the Court of Appeals are on the horns of a dilemma. Either the State Board of Public Accountancy is the State of Texas and its action is state action, in which event it clearly is not subject to the civil investigative demand as the District Court held, or it is not the State of Texas, in which event it is entitled to due process. No one can contend that it was accorded due process in this case.

In any event, whether or not the State Board of Public Accountancy is entitled to due process, it is

obvious that the Court of Appeals acted in an arbitrary, capricious and unreasonable manner.

On Wednesday, July 30, 1975, the Attorney General of the State was advised that the motion of the United States for summary reversal would be submitted to the Court the following Monday, August 4, whether or not the State had filed any opposition.

Rule 27(a) of the Federal Rules of Appellate Procedure provides for seven days within which to file a response to a motion, enlarged by three days under the provisions of Rule 26(c) unless shortened or extended by the Court. Those rules, however, did not contemplate a motion which would, in effect, bring about the rendition of a decision on the merits of the case. The submission of briefs is governed by Rule 31 of the Federal Rules of Appellate Procedure under which the State of Texas should have had 30 days within which to file a response to a brief, had the United States filed one. Nothing in the local rules of the United States Court of Appeals for the Fifth Circuit and no order of the court shortened that time.

The State had no objection to the United States' appeal being placed on the summary calendar and so advised the Clerk. With that concession by the State, under the procedures prescribed by Rule 28 of the Federal Rules of Appellate Procedure. The State then should have had an opportunity to answer that brief and the issues and arguments raised by it.

To decide a case of this importance with two or three days allowed the State to respond to the motion of the United States was unreasonable and capricious and should not be allowed to stand.

WHEREFORE, PREMISES CONSIDERED, the State of Texas acting by and through its State Board of Public Accountancy respectfully prays that this Court grant the petition for writ of certiorari and for such other and further relief to which the State and its Board may be entitled.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, postage prepaid, by United States Certified Mail, return receipt requested, to Mr. Thomas E. Kauper, Department of Justice, Washington, D. C. 20530.

_____

David Kendall

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-2626

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

- - - - - - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - - - - - -

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for summary reversal is GRANTED.

APPENDIX B

1311. Definitions

For the purposes of this chapter—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 12 of this title;

(2) The Federal Trade Commission Act; and

(3) Any statute enacted on and after September 19, 1962 by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(f) The term "person" means any corporation, association, partnership, or other legal entity not a natural person;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(h) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 1313(a) of this title.

1312. Civil investigative demand—Issuance

(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

Contents

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of

documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

Reasonableness; privilege

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.

Territorial limits of service

(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

Service upon legal entity

(e) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

Return

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

1313. Antitrust document custodian—Designation; deputy custodians

(a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

Compliance with civil investigative demand; original documentary material

(b) Any person upon whom any demand issued under section 1312 of this title has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d) of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

Possession of documentary material; responsibility for use and return; copies for official use; examination

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the prepara-

tion of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

Delivery of documentary material for use in presentation of case or proceeding; return to custodian of material not in control of court or grand jury

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

Return to producer of documentary material not in control of court or grand jury

(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this chapter, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

Demand by producer for return of documentary material upon failure to institute case or proceeding within reasonable time after completion of examination and analysis of evidence

(f) When any documentary material has been produced by any person under this chapter for use in any antitrust investigation, and no such case or proceeding arising therefrom has been intituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.

Successor custodian; notice to producer of documentary material; duties and responsibilities of successor

(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

1314. Judicial proceedings—Petition for enforcement; venue

(a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person

resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

Petition for order modifying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

Petition for order requiring performance by custodian of duties; venue

(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

Jurisdiction; appeal; contempts

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

Applicability of Federal Rules of Civil Procedure

(e) To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter.

APPENDIX C

Art. 41a. Public Accountancy Act of 1945

Section 1. This Act may be cited as the "Public Accountancy Act of 1945".

Sec. 2. (a) The term "Board" when used in this Act means the "Texas State Board of Public Accountancy."

(b) The term "person" when used in this Act shall, unless the context indicates otherwise, mean individuals, partnerships and corporations.

(c) The term "state" when used herein includes any state, territory or insular possession of the United States, or the District of Columbia.

Sec. 3. (a) Nothing contained in this Act shall be construed as applying to restrict any official act of any County Auditor, or other officer of the state, county, municipality, quasi-municipality, or other political subdivision thereof, or any officer of a Federal department or agency, or of their assistants, deputies or employees while working in their official capacities.

(b) Nothing contained in this Act shall prohibit any person not a certified public accountant or public accountant from serving as an employee of a certified public accountant or public accountant or partnership composed of certified public accountants and/or public accountants holding a permit to practice issued by the Texas State Board of Public Accountancy; provided, however, that such employee shall not issue any accounting or financial statements over his name.

(c) Nothing contained in this Act shall prohibit a certified public accountant or a registered

public accountant of another state, or any accountant who holds a certificate, degree or license in a foreign country, constituting a recognized qualification for the practice of public accountancy in such country, from temporarily practicing in this state on professional business incident to his regular practice outside this state; provided, that such temporary practice is conducted in conformity with the laws of Texas and the regulations and rules of professional conduct promulgated by the Board.

Sec. 4. The Texas State Board of Public Accountancy shall consist of nine (9) members, each of whom shall be a citizen of the United States and a resident of this State. Members of the Board and their successors shall be appointed by the Governor, with the advice and consent of the Senate, and shall be accountants in public practice; at least five (5) of whom shall hold certified public accountant certificates issued under the laws of this State; and the other four (4) shall be public accountants in public practice who shall hold permits issued under the laws of this State or certified public accountants in public practice who shall hold certified public accountant certificates issued under the laws of this State. The term of office of each member of the Board shall be six (6) years or until his successor is appointed. Vacancies occurring during a term shall be filled by appointment for the unexpired term. The Governor shall remove from the Board any member whose certificate or permit to practice has been voided, revoked or suspended.
(Sec. 4 amended by Acts 1971, 62nd Leg., p. 934, ch. 146, Sec. 1, eff. May 10, 1971.)

Sec. 4. (a) A Board member, who has served as a member for six (6) consecutive years, shall not be eligible for reappointment until a lapse of two (2) years shall have occurred between the end of the term of his last prior appointment and the beginning of the new term of a new appointment.

Sec. 5. The Board shall administer the provisions of this Act. The Board shall formally elect a chairman and a secretary-treasurer from its members and may adopt such rules as it deems necessary for the orderly conduct of its affairs. The Board may promulgate, and may amend from time to time, rules of professional conduct appropriate to estabish and maintain a high standard of integrity in the profession of public accountancy, after notice to all holders of valid permits to practice public accountancy in this State. Such notice shall set forth the proposed rules of professional conduct, or amendments, and the time when same shall be voted on by public accountants holding valid permits under this Act. No such rule or amendment shall be operative until approved by a majority of those voting at such election. The voting shall be by mail and under such reasonable rules and regulations as the Board may prescribe. The Board shall declare the results of such election and proclaim the effective date of such rules of professional conduct, or amendments, and adopt reasonable means of notifying all public accountants of the results of such election. A majority of the Board shall constitute a quorum for the transaction of business. The Board shall keep a seal which shall be judicially noticed. The Board shall keep records of all proceedings and actions by and before the Board. The Board may employ such

clerks as are necessary to assist it in the performance of its duties and in the keeping of its records. The members of the Board who are noncertified public accountants shall have all the authority, responsibility and duties of any other member of said Board except as to the giving of examinations to candidates seeking the certificates of Certified Public Accountant, and except as to all other matters relating to the issuance of certificates as Certified Public Accountants as provided for in Section 12 of the Public Accountancy Act of 1945. The Board members holding certificates as Certified Public Accountants shall have the sole authority, responsibility and duty of performing all acts relating to such examinations and the issuance of certificates as Certified Public Accountants.

Sec. 6. Members of the Board shall not receive any compensation for their services, but shall be reimbursed for their necessary expenses incurred in the discharge of their official duties.

Sec. 7. All expenses incurred under this Act shall be paid from the fees collected by the Board under this Act. No expenses incurred under this Act shall ever be a charge against the funds of the State of Texas. The Board shall, as of December 31, 1946, and annually thereafter, report to the Governor of the State of Texas the receipts and disbursements under this Act, for each calendar year.

Sec. 8. (a) No person shall assume or use the title or designation "certified public accountant," or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card, or

device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a permit issued under Section 9 of this Act which is not revoked or suspended (hereinafter referred to as a "live permit"), and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of Section 14 of the Public Accountancy Act of 1945, and who holds a live permit issued under Section 9 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(b) No partnership shall assume or use the title or designation "certified public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card or device tending to indicate that such partnership is composed of certified public accountants unless such partnership is registered as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(c) No person shall assume or use the title or designation "public accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a public accountant, unless such person is registered as a public accountant under Section 11 or

Section 13 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, or unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(d) No partnership shall assume or use the title or designation "public accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership is composed of public accountants, unless such partnership is registered as a partnership of public accountants under Section 19 of the Public Accountancy Act of 1945, or as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, and holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a live

permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof may hold himself out to the public as an "accountant" or "auditor" or combinations of said terms; and provided further, that a foreign accountant registered under Section 14 of the Public Accountancy Act of 1945, who holds a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(f) No corporation shall assume or use the title or designation "certified public accountant," or "public accountant," nor shall any corporation assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," "registered accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations "CPA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA." If a corporation was registered under Section 10 of the Public Accountancy Act of 1945, prior to November 1, 1945, and holds a live permit under Section 9 hereof, it may use the same designations applicable to certified public accountants or public accountants hereinabove set out.

(g) No person shall sign or affix his name or any trade or assumed name used by him in his

profession or business, with any wording indicating that he is an accountant or auditor, or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this Subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of said organization with any wording designating the position, title or office which he holds in said organization, nor shall the provisions of this Subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(h) No person shall assume or use the title or designation "certified public accountant" or "public accountant" in conjunction with names indicating or implying that there is a partnership or in conjunction with the designation "and Company," or "and Co.," or a similar designation if, in any such case, there is in fact no bona fide partnership registered under Sections 17 or 19 of the Public Accountancy Act of 1945; provided that a partnership lawfully using such title or designation in conjunction with such names or designation on the effective date of this Act, may continue to do so if it otherwise complies with the provisions of this Act.

Sec. 9. Permits shall be issued by the Board to the following upon the payment of fees hereinafter specified:

(a) Holders of the certificate of "Certified

Public Accountant" issued under this or any prior Acts.

(b) Such persons as are registered with the Board under the provisions of Section 10 of this Act.

(c) Such persons as are registered with the Board under the provisions of Section 14 of the Public Accountancy Act of 1945.

There shall be paid to the secretary-treasurer of the Board by all persons referred to in Subsections (a), (b) and (c) hereof an annual permit fee not to exceed Twenty Dollars ($20.00). All permits shall expire on the 31st day of December of each year, but shall, annually, be renewed for a period of one (1) year, upon the payment of a fee of not more than Twenty Dollars ($20.00), the Board being hereby given the authority and duty to determine the amount of such renewal fee for each coming year on or before December 1 of each year, and to mail notices thereon each year by that date.

Failure of any permit holder to pay the annual permit renewal fee on or before January 31 of each year shall automatically cancel his permit. Any permit holder whose permit shall have been canceled because of failure to pay the annual permit renewal fee may secure reinstatement of his permit at any time within that calendar year upon payment of the delinquent fee together with a penalty of Ten Dollars ($10.00). After expiration of the calendar year for which the permit fee was not paid, no permit shall be reinstated except upon application and examination satisfactory to the Board. The Board shall have no authority to waive the collection of any fee or penalty.

(Sec. 9 amended by Acts 1971, 62nd Leg., p. 931, ch. 145, Sec. 1, eff. May 10, 1971.)

Sec. 9A. The board by rule may adopt a system under which permits expire on various dates during the year. Dates relating to cancellation and reinstatement of permits shall be adjusted accordingly. For the year in which the permit expiration date is changed, permit fees payable on or before January 31 shall be prorated on a monthly basis so that each permit holder shall pay only that portion of the permit fee which is allocable to the number of months during which the permit is valid. On renewal of the permit on the new expiration date, the total permit renewal fee is payable.
(Sec. 9A added by Acts 1973, 63rd Leg., p. 624, ch. 266, Sec. 5, eff. June 11, 1973.)

Sec. 10. The following persons shall be registered with the Board for the practice of public accountancy in this state:

(a) All individuals and public accountants qualified or who may qualify under Section 11 of the Public Accountancy Act of 1945.

(b) Partnerships qualified under Sections 17 or 19 of the Public Accountancy Act of 1945, as amended. The name or designation under which any partnership may be registered shall contain the personal name or names of one or more individuals presently or previously members thereof, and shall not contain any descriptive words indicating character or grade of service offered.

(c) Corporations qualified under Section 21 of the Public Accountancy Act of 1945. Provided, however, that no corporation may hereafter be created for the purpose of engaging in the practice of public accountancy within this state after the effective date of this Act. No corporate charters or corporate

permits shall be renewed one (1) year after the effective date of this Act.

(d) Each office established or maintained in this state for the practice of public accounting in this state by a certified public accountant, or partnership of certified public accountants, or by a public accountant, or a partnership of public accountants, or by one registered under Section 14 shall be registered under this Act with the Board, but no fee shall be charged for such registration. Each such office shall be under the direct supervision of a resident manager who may be either a principal or a staff employee holding a permit issued by the Board which is in full force and effect; provided that the title or designation "certified public accountant" or the abbreviation "C.P.A." shall not be used in connection with such office unless such resident manager is the holder of a certificate as a certified public accountant and a permit issued by the Board, both of which are in full force and effect. Such resident manager may serve in such capacity only in one office at the same time. The Board shall by regulation prescribe the procedure to be followed in effecting such registrations.

All applicants for registration shall furnish satisfactory evidence that the applicant is entitled to registration. The Board shall have power to examine such applications and may refuse registration to any applicant who is unable to meet the standards imposed by this Act.

Sec. 11. All persons listed in subdivisions (a), (b), and (c) of this Section who are citizens of the United States, or have declared their intention of becoming citizens, who reside within the State or

have a place for the regular transaction of business therein, and who are twenty-one (21) years of age or over, and of good moral character, may register on or before the first day of November, 1947, with the Board as public accountants as provided in Section 10 of Acts 1945, Forty-ninth Legislature, page 517, Chapter 315;

(a) Persons engaged at the date of the enactment of this Act, or persons who have engaged for at least three (3) years during the ten (10) years immediately preceding the date of enactment of this Act, in the practice of public accountancy within the State either as individuals on their own account, members of copartnerships engaged in the practice of public accountancy, or as officers of corporations engaged in the practice of public accountancy;

(b) Any individual who at the date of the enactment of this Act, may be an employee of any person engaged in the practice of public accountancy or may be employed in any governmental agency, provided all such persons meet any one of the three (3) following standards:

(1) Who is a graduate of a junior college, senior college or university and has completed thirty (30) or more semester hours or the equivalent thereof in the study of accounting, business law, economics and finance, of which at least twenty (20) semester hours or the equivalent thereof shall be in the study of accounting, and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters for two (2) years preceding the date of application; or

(2) Who is a graduate of a junior college, senior college or university but has not completed the hours of study in subjects specified in subdivision (1) of this Section, and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters for three (3) years preceding the date of application; or

(3) Who is a graduate of a high school or has an equivalent education and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters, for at least four (4) years preceding the date of application;

(c) Individuals serving in the armed forces of the United States or any of the United Nations, who at the date of entering such service may be qualified as specified in either subdivision (a) or (b) of this Section. In the case of any person serving in the armed forces of the United States or any of the United Nations on the effective date of this Act, the Board shall extend the time for compliance prescribed by any provisions of this Act, for a period of twelve (12) months from the time such person is honorably discharged from such service.

Sec. 12. The certificate of a "Certified Public Accountant" shall be granted by the Board to any person:

(a) Who is a citizen of the United States or who, if not a citizen, has lived in the State of Texas for the 90 days immediately preceding the date of submitting to the Board the initial application to take the written examination conducted by the Board for the purpose of granting a certificate of "Certified Public Accountant," or has maintained his permanent legal residence in Texas for the six months immediately preceding said date of submission; and

(b) Who is a resident of the State of Texas, or has a place of business therein, or, as an employee, is regularly employed therein, and provided that any person who shall have qualified to take the examination for the certificate in this state, and who, while so qualified shall have received credit for all or any part thereof, shall remain qualified under this Subsection until he receives his certificate; and

(c) Who has attained the age of twenty-one (21) years; and

(d) Who is of good moral character; and

(e) Who meets the requirements of education and experience as hereinafter provided:

(1) During the three (3) year period immediately following the effective date of this Act the educational requirement shall be: (a) satisfactory completion of two (2) years of study at one (1) or more colleges or universities, recognized by the Board; or (b) graduation from a junior college, recognized by the Board, or such education as the Board determines to be substantially the equivalent thereof; and the experience requirements shall be four (4) years of accounting experience, satisfactory to the Board, as a certified public accountant in any state, or as a public accountant registered or entitled to register under Sections 11 or 13 hereof, or in

public practice under the guidance of such a certified public accountant or public accountant, or in an activity comparable thereto, or in any combination of such types of experience, in work of a nonroutine accounting nature, which continually requires independent thought and judgment on important accounting matters; or such education and experience requirements may be those set out in (2), (3), or (4) below:

(2) During the second three (3) year period following the effective date of this Act, the educational requirement shall be either (a) that specified in (1) above and, in addition, satisfactory completion of what the Board determines to be substantially the equivalent of an accounting major, including related courses in other areas of business administration; and the experience requirement shall be three (3) years of the experience described in (1) above; or (b) graduation from an accredited high school, plus two (2) years of study of accounting or related subjects in one (1) or more colleges or universities, recognized by the Board, plus six (6) years of experience under the supervision of a Certified Public Accountant in work described in (1) above, in which event such Certified Public Accountant or Certified Public Accountants, if the applicant has been employed by more than one (1), shall certify to the Board that the applicant has, during such six (6) year period, had the experience described in (1) above.

(3) After the expiration of six (6) years from the effective date of this Act, the educational requirement shall be either (a) a baccalaureate degree conferred by a college or university recognized by the Board, with a major in accounting, or with a non-

accounting major, supplemented by what the Board determines to be substantially the equivalent of an accounting major, including related courses in other areas of business administration; and the experience requirement shall be two (2) years of the experience described in (1) above; or (b) graduation from an accredited high school, plus two (2) years of study of accounting or related subjects in one (1) or more colleges or universities, recognized by the Board, plus six (6) years of experience under the supervision of a Certified Public Accountant in work described in (1) above, in which event such Certified Public Accountant or Certified Public Accountants, if the applicant has been employed by more than one (1), shall certify to the Board that the applicant has, during such six (6) year period, had the experience described in (1) above.

(4) At any time after the effective date of this Act the experience requirement shall be only one (1) year of the experience described in (1) above for any candidate holding a Masters Degree with a major in accounting or business administration from a college or university recognized by the Board, or holding a professional degree in accounting designated other than a Masters Degree but judged by the Board to be equivalent to that degree and to be at an appropriate professional level, if he has satisfactorily completed such number of semester hours in accounting, business administration and economics, and such related subjects as the Board shall determine to be appropriate; and

(f) who shall have passed a written examination in theory of accounts, in accounting practice, in auditing, in commercial law as affecting public accounting, and in such other related subjects as the

Board shall determine to be appropriate. A grade of at least seventy-five per cent (75%) on each subject shall be required as a passing grade.

Any candidate who meets the educational requirements under Subsections (1), (2), (3), or (4) of (e) above, and who is duly enrolled as an attorney in the Supreme Court of Texas and has complied with the provisions of the State Bar Act and is a member of the State Bar in good standing, shall be given credit for commercial law without taking the written examination on commercial law.

The Board may by written regulations provide for granting credit to a candidate for his satisfactory completion of a written examination at one sitting in any two (2) or more of the subjects specified in (f) above given by the licensing authority in any other state; provided, that when he took such examination in such other state he was not a resident of Texas, had no place of business in Texas, nor, as an employee, was he regularly employed in Texas. Such regulations shall include such requirements as the Board shall determine to be appropriate in order that any examination approved as a basis for any such credit, shall, in the judgment of the Board, be at least as thorough as that included in the most recent examination given by the Board at the time of the granting of such credit.

None of the educational requirements specified in (1), (2), or (3) of (e) above shall apply to a candidate who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended.

A candidate who has met the educational requirements but has not met the experience requirements provided for herein, shall be eligible to take the examination in all subjects except accounting practice without waiting until he meets the experience requirements, or a candidate who has met the educational requirements as specified in (3) (a) of (e) above shall be eligible to take the entire examination without waiting until he meets the experience requirements, provided that in either case he also meets the requirements of (a), (b), and (d) above of this Section.

A candidate for the certificate of certified public accountant who has successfully completed the examination under (f) above, shall have no status as a certified public accountant, unless and until he has met all of the requirements, has the requisite experience, and has received notice of his certificate as a certified public accountant.

The holder of a certificate heretofore issued under the provisions of Chapter 122 of the Acts of the 34th Legislature,[1] or under subsequent Acts, shall not be required to secure a new certificate as a certified public accountant under this Act.

The applicable educational and experience requirements under Subsections (1), (2) or (3) of (e) of this Section shall be those in effect on the date of his application for the examination or reexamination by which the candidate successfully completes his examination under (f) above. With reference to any candidate who has passed at least one (1) subject under any prior Act, the applicable educational and

experience requirements shall be those in effect immediately prior to the effective date of this Act.

Any person who, at the effective date of this Act, has entered a program to meet the education and experience requirements of the Public Accountancy Act of 1945 as in force immediately prior to the effective date of the amendments by this Act, shall file with the Board within 180 days after the effective date of this Act, a written declaration thereof, and submit such proof thereof as the Board may require. After the filing of such declaration and proof, under rules and regulations prescribed by the Board, said person shall be allowed the time reasonably required to complete his program to meet the education and experience requirements in force immediately prior to the effective date of this Act, but not more than four (4) years after the effective date of this Act, and on completion of such requirements, if otherwise qualified to take the examination, he shall be permitted to make his application and take the examination under such education and experience requirements.

Every person who has met the requirements of (a), (b), (c), (d), (e), and (f) of this Section and is ready to receive his certificate as a "Certified Public Accountant," shall, before receiving such certificate, take an oath that he will support the Constitution of the United States and of this state, and the laws thereof, and will comply with the rules of professional conduct promulgated under the Public Accountancy Act of 1945 as amended. This oath shall be administered by a member of the Board or by such other person as may be authorized by law to administer oaths.

Sec. 13. (a) The Board may in its discretion waive the examination of, and may issue a certificate of "Certified Public Accountant" to any person possessing the other qualifications mentioned in Section 12 of this Act who is the holder of a certificate as Certified Public Accountant issued under the laws of any state or territory (or the equivalent thereof issued in any foreign country), provided the requirements for such certificate in the state or territory (or foreign country) which has granted it to the applicant were, in the opinion of the Board, at least equivalent to those required in this state at the time the applicant's original certificate was issued. The Board shall charge for the issuance of such a certificate as a "Certified Public Accountant," under this Section a fee of not more than Seventy-five Dollars ($75.00).

(b) Any person holding a permit under the laws of any state or territory to practice public accountancy, if such state or territory, in the opinion of the Board, has standards equal to those required by this state, shall be granted a permit by the Board if such state or territory admits public accountants of this state to practice in such state or territory; provided, however, no such permit shall be granted by the Board unless such person had made application for a permit to practice public accountancy to the licensing board of his own state not later than November 1, 1947. For such permits as are authorized by this Section the Board shall charge the same annual permit fees and reinstatement fees as are charged all other persons to whom annual permits are issued by the Board.

Sec. 14 A certified public accountant of another state or territory, or the holder of a certificate, license, or degree authorizing him to practice public accountancy in a foreign country, may register with the Board as a certified public accountant of such other state or territory, or as holding such certificate, license or degree of a foreign country, if the Board determines that the standards under which the applicant became a certified public accountant, or received such certificate, license, or degree, were as high as the standards of this state at the same time for giving the Certificate of Certified Public Accountant. A person so registered may describe himself as a certified public accountant of the state or territory which issued his certificate, or may use the title held by him in a foreign country, provided that the country of its origin is indicated.

Sec. 15 All examinations provided for under the Public Accountancy Act of 1945, as amended, shall be conducted by the Board. The examination for the certificate of "Certified Public Accountant" shall take place as often as the Board deems necessary, but not less frequently than once each year. The time and place of holding examinations shall be duly advertised for not less than three (3) days in three (3) daily newspapers published, one (1) in each of three (3) principal cities in Texas, beginning not less that thirty (30) days prior to the date of each examination.

A candidate, who fails, shall have the right to apply for an additional examination, subject to the satisfaction of the Board that he continues to meet

requirements of (a), (b), and (d) of Section 12 of this Act, and the following additional requirements: (1) if a candidate fails to score a grade of fifty per cent (50%) on any subject in an examination, the Board shall refuse to admit him to write that subject in the next succeeding examination; and (2) if a candidate has made application to write the examination at a session and he fails to submit a paper on any subject for which he is eligible at that session, the Board shall score a grade of less than fifty per cent (50%) for the candidate in that subject. Except for the foregoing requirements, a candidate, who has taken the examination under this Act or any prior Act, shall have the right to any number of reexaminations. The additional requirements specified in (1) and (2) of this paragraph shall not apply to a candidate who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended.

Any candidate who, at the time of filing his application to take the examination, or reexamination, provided for herein, had, prior to the effective date of this Act, passed one (1) or more subjects under any prior Act, or who shall, after the effective date of this Act, pass in a single examination two (2) or more subjects, or who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended, and who shall pass one (1) or more subjects after the effective date of this Act, shall have the right, subject to the approval of his application for reexamination under the provisions of the preceding paragraph, to be reexamined in the remaining subjects only, at subsequent examinations held by the Board, may re-

ceive credit for one (1) or more subjects in any subsequent examination, and when he shall have received credit for all subjects, he shall then be considered to have passed the examination.

The Board shall charge for the first examination of a candidate for certification as a "Certified Public Accountant" a fee of not more than Seventy-Five Dollars ($75.00), which shall be payable by the applicant at the time of making the initial application. For each subsequent examination, or reexamination, the fee shall not exceed for each subject for which he is eligible: Thirty Dollars ($30.00) for accounting practice, and Fifteen Dollars ($15.00) for each of theory of accounts, auditing and commercial law, which shall be payable by the applicant at the time of making the application for the subsequent examination or reexamination. Where the applicant fails to be present for the examination and shows to the Board satisfactory reason for such failure, the Board may, in its discretion, refund any fee so paid, and relieve the candidate of the penalty in the second paragraph of this Section relating to the grade of less than fifty per cent (50%).

All fees provided for herein shall be paid to the secretary-treasurer of the Board.

It is further provided, that any applicant who has failed any such examination or examinations shall have a right to demand a copy, certified by the Board, of the questions and the answers thereto made by him upon any such examination, with the grade clearly shown, together with a copy of solutions to such questions; and the Board shall forth-

with comply with such demand by delivering by registered mail to such applicant a true copy of the questions and his answers thereto, certified by the Board, together with a copy of solutions to such questions, and the Board may charge such applicant a reasonable fee therefor; and such application by the candidate shall be made within six (6) months after the grades are mailed to said candidate, and not thereafter.
(Sec. 15 amended by Acts 1971, 62nd Leg., p. 932, ch. 145, Section 3, eff. May 10, 1971.)

Sec. 16. Any person who has received from the Board a certificate of Certified Public Accountant and holds a valid permit to practice, shall be styled and known as a "Certified Public Accountant" and may also use the abbreviation "C.P.A."

Sec. 17. A partnership engaged in this state in the practice of public accountancy may register with the Board as a partnership of certified public accountants provided it meets the following requirements:

(a) At least one general partner thereof must be a certified public accountant of this state in good standing.

(b) Each partner thereof personally engaged within this state in the practice of public accountancy as a member thereof must be a certified public accountant in this state in good standing.

(c) Each partner thereof must be a certified public accountant of some state in good standing.

(d) Each resident manager in charge of an office of the firm in this state must be a certified public accountant of this state in good standing.

Application for such registration must be made upon the affidavit of a general partner of such partnership who is a certified public accountant of this state in good standing. Such affidavit must set forth the partnership name and the post office address thereof within the state, and the address of the principal office thereof, wherever located, together with the name, residence and post office address of each general partner. The Board shall in each case determine whether the applicant is eligible for registration. A partnership which is so registered and which holds a permit issued under Section 9 of this Act may use the words "certified public accountants" or the abbreviation "C.P.A.'s" in connection with its partnership name. Notification shall be given the Board, within one month, after the admission to or withdrawal of a partner from any partnership so registered.

Sec. 18. Any individual qualified under this Act to register with the Board for the practice of public accountancy and who has so registered, and who holds a valid permit for the practice of public accountancy, may be styled and known as a "public accountant."

Sec. 19. A partnership engaged in this state in the practice of public accountancy may register with the Board as a partnership of public accountants provided it meets the following requirements:

(a) At least one general partner thereof must be a certified public accountant or a public accountant of this state in good standing.

(b) Each partner thereof personally engaged within this state in the practice of public accountancy

as a member thereof must be a certified public accountant or a public accountant of this state in good standing.

(c) Each resident manager in charge of an office of a firm in this state must be a certified public accountant or a public accountant of this state in good standing.

Application for such registration must be made upon the affidavit of a general partner of such partnership who holds a permit to practice in this state as a certified public accountant or as a public accountant. Such affidavit must set forth the partnership name and the post office address thereof within the state, together with the name, residence and address of each general partner of the partnership. The Board shall in each case determine whether the applicant is eligible for registration. A partnership which is so registered and which holds a partnership permit issued under,Section 9 of this Act may use the words "public accountants" in connection with its partnership name. Notification shall be given the Board, within one month, after the admission to or withdrawal of a partner from any partnership so registered.

(Sec. 20. Repealed. Acts 1961, 57th Leg., p. 608, ch. 289, Sec. 12. Eff. Aug. 28, 1961.)

Sec. 21. A corporation authorized to engage in the practice of public accountancy in this state and actually engaged in such practice at the time of the enactment of this Act, may register with the Board as a corporation engaged in the practice of public accountancy. Application for such registration must be made upon the affidavit of an officer of such

corporation. The Board,shall in each case determine whether the applicant is eligible for registration. A corporation which is so registered and which holds a permit issued under this Act may practice public accountancy under a corporate name indicating that it is engaged in such practice, provided it had such corporate name before the enactment of this Act.

Sec. 22. (a) After notice and hearing as provided in Section 23 of this Act, the Board may revoke or may suspend for a period not to exceed five (5) years, any certificate issued under Sections 12 or 13 of this or any prior Acts, or any registration granted under Sections 10 or 14 of this or any prior Acts, or may revoke, suspend or refuse to renew any permit issued under Sections 9 or 13 of this Act, or may reprimand the holder of any such permit for any one or more of the following causes:

(1) Fraud or deceit in obtaining a certificate as certified public accountant, or in obtaining registration under this or any prior Acts, or in obtaining a permit to practice public accounting under this Act.

(2) Dishonesty, fraud or gross negligence in the practice of public accounting.

(3) Violation of any of the provisions of Section 8 of the Public Accountancy Act of 1945, as amended by this Act.

(4) Violation of a rule of professional conduct promulgated by the Board under the authority granted by law.

(5) Conviction of a felony under the laws of any state or of the United States.

(6) Conviction of any crime, an element of

which is dishonesty or fraud, under the laws of any state or of the United States.

(7) Cancellation, revocation, suspension, or refusal to renew authority to practice as a certified public accountant or a public accountant by any other state, for any cause other than failure to pay an annual registration fee in such other states.

(8) Suspension or revocation of the right to practice before any state or federal agency, for a cause which, in the opinion of the Board, warrants its action.

(9) Failure of a certificate holder or registrant to obtain an annual permit under Section 9 of the Public Accountancy Act of 1945, as herein amended, within either (a) three (3) years from the expiration date of the permit to practice last obtained or renewed by said certificate holder or registrant, or (b) three (3) years from the date upon which the certificate holder or registrant was granted his certificate or registration, if no permit was ever issued to him, unless such failure shall be excused by the Board pursuant to the provisions of said Section 9.

(Sec. 22(a)(9) renumbered from Sec. 22(a)(10) by Acts 1971, 62nd Leg., p. 935, ch. 146, Sec. 3, eff. May 10, 1971.)

(10) Conduct discreditable to the public accounting profession.

(Sec. 22(a)(10) renumbered from Sec. 22(a)(11) by Acts 1971, 62nd Leg., p. 935, c. 146, Sec. 3 eff. May 10, 1971.)

(11) Conduct discreditable to the public accounting profession.

(b) After notice and hearing as provided in Section 23 of the Public Accountancy Act of 1945, as

herein amended, the Board shall revoke the registration and permit to practice of a partnership, if at any time it does not have all the qualifications prescribed by the Section of this Act under which it qualified for registration.

After notice and hearing as provided in said Section 23, the Board may revoke or suspend the registration of a partnership or may revoke, suspend or refuse to renew its permit under Section 9 to practice or may reprimand the holder of any such permit for any of the causes enumerated in part (a) of this Section, or for any of the following additional causes:

(1) The revocation or suspension of the certificate or registration or the revocation or suspension or refusal to renew the permit to practice of any partner.

(2) The cancellation, revocation, suspension or refusal to renew the authority of the partnership or any partner thereof to practice public accounting in any other state for any cause other than failure to pay annual registration fee in such other state.

Sec. 23. (a) The Board may initiate proceedings under this Act either on its own motion or on the complaint of any person.

(b) A written notice stating the nature of the charge or charges against the accused and the time and place of the hearing before the Board on such charges shall be served on the accused, not less than twenty (20) days prior to the date of said hearing, either personally or by mailing a copy thereof by registered mail to the address of the accused last known to the Board.

(c) At any hearing the accused may appear in

person and by counsel, produce evidence and witnesses on his own behalf, cross-examine witnesses, and examine such evidence as may be produced against him. The accused shall be entitled, on application to the Board, to the issuance of subpoenas to compel the attendance of witnesses on his behalf.

(d) The Board, or any member thereof, may issue subpoenas to compel the attendance of witnesses and the production of documents, and may administer oaths, take testimony, hear proofs and receive exhibits in evidence in connection with or upon hearing under this Act. In case of disobedience to a subpoena the Board may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(e) If, after having been served with the notice of hearing as provided for herein, the accused fails to appear at said hearing the Board may proceed to hear evidence against him and may enter such order as shall be justified by the evidence and a copy of such order shall be mailed by registered mail to the last known address of the accused. The Board is hereby authorized to grant continuances upon written request and, upon a showing of good cause for failure to appear at such hearing, set out in writing, signed by the accused and filed with the Board, the Board may reopen said proceedings and permit the accused to submit evidence in his behalf, provided further, that said written request to reopen is filed with the Board within twenty (20) days after a copy of said order has been mailed to the accused.

(f) A stenographic record of the hearings shall be kept and, if deemed necessary by the Board, a

transcript thereof shall be prepared and filed with the Board.

(g) At all hearings the Attorney General of this state, or one of his assistants, or such other legal counsel as may be employed, shall appear and represent the Board.

(h) The decision of the Board shall be by majority vote thereof.

(i) Any person, firm or corporation adversely affected by any order, rule or decision of the Board may file a petition in the District Court of the county of his residence in Texas, or by a nonresident of Texas in the District Court of Travis County, Texas, setting forth the particular objection to such decision, rule or order, against the Texas State Board of Public Accountancy as defendant, such petition to be filed within thirty (30) days after the date a copy of such order is sent by registered mail to such person, firm or corporation. Service of citation may be had by leaving a copy thereof at the office of the Board in Austin, Travis County, Texas. The case shall be tried as other civil cases. The cause shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the justice court to the county court. Either party to said action may appeal to the appellate court having jurisdiction of said cause. The Board shall not be required to give any appeal bond in any cause arising hereunder. Neither the Texas State Board of Public Accountancy nor any member thereof shall be liable to any person, firm or corporation charged or investigated by said Board, for any damages incident to such investigation, or any complaint, charge, prosecution, proceeding or trial.

(j) Upon application in writing and after hearing pursuant to notice, the Board may issue a new certificate to a certified public accountant whose certificate shall have been revoked, or may permit the reregistration of anyone whose registration has been revoked, or may reissue or modify the suspension of any permit to practice public accounting which has been revoked or suspended.

Sec. 24. (a) Whenever in the judgment of the Board any person who is not the holder of a valid and existing permit to practice public accountancy in this state has engaged in any act or practices which constitute the practice of public accountancy within this state, the Board may apply to the District Court of the county in which such person resides or has an office, for an injunction enjoining such person from engaging in the practice of public accountancy, and in such cases the Board shall not be required to give bond as a condition precedent to the issuance of such injunctive relief.

(b) Any person who violates any provision of the Public Accountancy Act of 1945, as amended, or of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than Fifty Dollars ($50.00) and not more than Five Hundred Dollars ($500.00) or by imprisonment in county jail for not less than ten (10) days and not more than one (1) year or by both such fine and imprisonment, and each violation shall constitute a separate offense. Any complaints filed under the provisions of this Section shall be filed in the county where the offense occurred.

Sec. 25. If any section or any part of this Act

shall be held to be invalid, such invalidity shall not affect the remaining portions thereof, it being the express intention of the Legislature to enact such Act without respect to such section or part so held to be invalid.

APPENDIX D

United States Department of Justice

ANTITRUST DIVISION
WASHINGTON, D.C. 20530

TO Texas State Board of
Public Accountancy
940 American Bank Tower
Austin, Texas 78701

CIVIL INVESTIGATIVE DEMAND NO. [illegible]

This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548-552, Title 15 United States Code Secs. 1311-1314, in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Secs. 1 by conduct of the following nature: Agreements to restrain interstate trade and commerce in the sale of accounting services.

You are a person under investigation and are hereby required to produce, to make available for inspection and copying or reproduction, and to deliver to a custodian named herein, at your principal place of business, designated above, the documentary material in your possession, custody or control described on the attached ~~schedule~~, on the 6th day of January, 19 75 at 1:00 A.M. ____ P.M.

For the purposes of this investigation, the following are designated as custodians or deputy custodians to whom said documentary material shall be made available and delivered: Hays Gorey, Jr. (Custodian); Michael A. Rosen (Deputy Custodian)

Inquiries concerning compliance should be directed to Hays Gorey, Jr., Attorney, Antitrust Division, Department of Justice, Washington, D. C. 20530 (202) 739-2434

Your attention is directed to the provisions of Title 18 United States Code Sec. 1505 as amended which makes obstruction of this investigation a criminal offense and which is printed in full on the reverse side hereof.

Issued at Washington, D.C. this 29th day of November, 19 74

RECEIVED
DEC 3 [illegible]
Texas State Board of Public Accountancy
AUSTIN, TEXAS

Assistant Attorney General

"§ 1505. Obstruction of proceedings before departments, agencies, and committees

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

"Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Certificate of Compliance with Civil Investigative Demand

All of the documentary material described on the attached schedule which is in the possession, custody or control of the person to which this civil investigative demand is directed has been produced and made available to a custodian named therein.

Date _____

Signature _____

Title _____

SCHEDULE

I. DEFINITIONS

As used herein the following terms have the meanings indicated:

1. "TSBPA" means the Texas State Board of Public Accountancy and includes any member, employee, agent or other person acting for or on behalf of the TSBPA.

2. "Document" means any writing or record of any type or description in the possession, custody or control of the TSBPA, wherever located, however produced or reproduced, whether an original or a copy (including but not limited to carbon, handwritten, typewritten, microfilm, photostatic and xerographic copies) and including any non-identical copy (whether different from the original because of any alterations, notes, comments or otherwise); together with any attachment thereto or enclosure therewith.

3. "Permit holders" means persons holding permits to practice public accountancy in the State of Texas.

4. "Accountant" means any person, firm or corporation engaged in the practice of public accountancy in any State of the United States, and includes permit holders.

II. DOCUMENTS TO BE PRODUCED

1. Documents sufficient to show the organization of the TSBPA, its administrative regulations, the purposes for which it exists and its relationship

to the government of the State of Texas.

2. Copies of all TSBPA Rules of Professional Conduct adopted or in effect at any time since January 1, 1965.

3. All documents, whenever prepared, sent or received, which discuss or comment on the consideration, adoption, amendment and/or promulgation of Rule 6 and/or Rule 14 of the TSBPA Rules of Professional Conduct.

4. All documents prepared, sent or received since January 1, 1970, which discuss or comment on competitive bidding and/or solicitation by accountants, including communications between the TSBPA and any other person.

5. All documents prepared, sent or received since January 1, 1970, which constitute, discuss or comment on formal or informal charges, complaints or other communications that any accountant has violated or may have violated Rule 6 or Rule 14 of the TSBPA Rules of Professional Conduct.

6. All documents prepared, sent or received since January 1, 1970, which concern actual or proposed disciplinary action of any type taken or to be taken by the TSBPA against any accountant for violations of Rule 6 or Rule 14 of the TSBPA Rules of Professional Conduct.

III. CLAIM OF PRIVILEGE

If any document is withheld under claim of privilege, furnish a list signed by the person supervising the response to this demand, stating as to each document for which the privilege is claimed the following information: its date; the names, addresses and titles of its author(s), addressee(s) and the

persons to whom copies were furnished; the number of pages in the document; its subject matter; the basis on which privilege is claimed.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY V. UNITED STATES OF AMERICA	CIVIL ACTION NO. A-74-CA-270

MEMORANDUM OPINION AND ORDER

This cause having come before the Court for trial, and the parties having submitted argument, evidence and authorities, the Court now enters this Memorandum Opinion and Order, constituting its findings of fact and conclusions of law. This case arises from an attempt by the United States Department of Justice Antitrust Division to enforce a Civil Investigative Demand (CID) requiring the Texas State Board of Public Accountancy to produce certain documents and information.

On November 29, 1974, the Antitrust Division issued Civil Investigative Demand No. 1597, which was served upon the State Board on December 3, 1974. On December 23, 1974, the Board filed this suit pursuant to 15 U.S.C. Sec. 1314(b), seeking to have CID No. 1597 set aside and held for naught. On February 26, 1975, the United States filed its petition to enforce that CID pursuant to 15 U.S.C. Sec. 1314(a). The parties agree that no disputed issues of fact exist, and that the resolution of this

case turns upon the validity of the Board's claim that it is immune from the provisions of the Sherman Act, and thus not subject to enforcement of the disputed CID.

CID No. 1597 states that it was issued pursuant to a Justice Department investigation

> . . . for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Sec. 1 by conduct of the following nature: Agreements to restrain interstate trade and commerce in the sale of accounting services.

CID No. 1597 further advises the Board, "You are a person under investigation. . . ."

15 U.S.C. Sec. 1312(a) states that

> Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession. . .of any documentary material relevant to a civil antitrust investigation, he may. . .

issue a civil investigative demand requiring production of such material. The State Board contends, however, that it falls within the "state action" exemption from the Sherman Act set forth in Parker v. Brown, 317 U.S. 341 (1943).

If the Board is exempt from the provisions of the Sherman Act, it cannot be a "person under investigation" subject to the Antitrust Division's civil investigative demand issuance authority conferred by 15 U.S.C. Sec. 1312(a). The United States contends that the Board is a "person" subject to the Sherman Act and that, in any event, a claim of immunity is premature at this stage and may not be used to deny enforcement of a civil investigative demand.

We recognize and accept the general proposition that administrative subpoenas are to be enforced "where the evidence necessary to establish. . .(an essential element of the offense) is in the possession of the suspected violator and can be secured only by such a subpoena." Federal Trade Commission v. Gibson, 460 F.2d 605, 608 (5th Cir. 1972). See also Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972). We further recognize that those cases and others cited to us by the United States arose from settings in which an assertion of immunity or exemption from the applicable regulatory provisions rested upon a determination of disputed factual issues. The courts have properly refrained from intervening in administrative investigations in such situations, inasmuch as no claim of immunity or exemption could be established as a matter of law and the governmental agencies in each case were acting within their statutory authority.

Congress has, however, designated the district courts of the United States as the forum in which a

person upon whom a civil investigative demand has been served may petition for an order modifying or setting aside such demand. 15 U.S.C. Sec. 1314(b). This Court must consider any claim based upon a failure of the demand to comply with the legal provisions authorizing its issuance, or upon any constitutional or other legal right or privilege of the person served. Id.

The Texas State Board of Public Accountancy is created by statute as an independent State regulatory agency whose members are appointed by the Governor, with the advice and consent of the Senate. TEX. REV. CIV. STAT. ANN. art. 41a, Sec. 4. Each member must take a constitutional oath of office. TEX. CONST. art. XVI, Sec. 1. The Governor may require that any Board member give written information, under oath, on any subject relating to his official responsibilities. TEX. CONST. art. IV, Sec. 24. The Board is statutorily authorized to promulgate rules of professional conduct, with the approval of a majority of licensed public accountants. TEX. REV. CIV. STAT. ANN. art., 41a, Sec. 5. The Board licenses, registers, examines and generally regulates the professional practices of certified public accountants and public accountants in Texas. The Board may revoke or suspend a certificate or permit after notice and hearing. Id., Sec. 22. The Board may hold hearings, issue subpoenas to compel the attendance of witnesses and the production of documents, administer oaths, take testimony, hear proofs, and receive exhibits in evidence in connection with any such hearing. The Board may invoke the aid of any court of the State in requiring the attendance and testimony of witnesses and the

production of documentary evidence. Decisions of the Board are reviewable in the district courts of Texas. Id., Sec. 23. The Board may apply in the district courts of Texas for an injunction enjoining the practice of public accountancy by any unauthorized person. Id., Sec. 24.

In short, actions of the Board "derive. . . (their) authority and. . .efficacy from the legislative command of the state. . . ." Parker v. Brown, 317 U.S. 341, 350 (1943). We perceive the question of the Board's immunity from the Sherman Act to be squarely controlled by Parker v. Brown, supra. The principle ". . .is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672, 675 (5th Cir. 1968). See also Saenz v. University Interscholastic League, 487 F. 2d 1026 (5th Cir. 1973).

The immunity of the Board from the provisions of the Sherman Act is established as a matter of law, and nothing that might be discovered through enforcement of CID No. 1597 can alter the fact that its acts are those of a sovereign, "which the Sherman Act did not undertake to prohibit." Parker v. Brown, supra at 352. The decision when and through whom its sovereign power is to be exercised rests with the State, and the State has spoken. The Public Accountancy Act of 1945, TEX. REV. CIV. STAT. ANN. art. 41a, designates the Texas State Board of Public Accountancy as an arm of the State, and confers upon it the rights, privileges and immunities attendant thereto.

Actions of the Board are thus immune from the provisions of the antitrust laws, rendering the Board exempt from being considered a "person under investigation" within the scope of 15 U.S.C. Sec. 1312(a). Thus, Civil Investigative Demand No. 1597 was issued without statutory authority, and must be set aside and held for naught. It is accordingly

ORDERED, ADJUDGED and DECREED that Civil Investigative Demand No. 1597 be, and hereby is, SET ASIDE and HELD FOR NAUGHT; and that the Petition of the United States for Enforcement of Civil Investigative Demand No. 1597 be, and hereby is, DENIED.

Entered the 16th day of April, 1975, at Austin, Texas.

/S/ Jack Roberts
JACK ROBERTS
UNITED STATES DISTRICT
JUDGE

Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

No. 75-531

In the Supreme Court of the United States

OCTOBER TERM, 1975

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-531

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Alleging immunity from liability under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.*, petitioner Texas State Board of Public Accountancy (Board) contends that the court of appeals erred in summarily reversing the district court's refusal to enforce a Civil Investigative Demand (CID) served upon the Board in connection with an antitrust investigation.

The United States served upon the Board a CID, a form of administrative subpoena issued pursuant to Section 3 of the Antitrust Civil Process Act, 76 Stat. 548, 15 U.S.C. 1312, after a preliminary investigation revealed that accountants in the State of Texas and the Board may be engaging in anticompetitive

practices—*e.g.*, the Board has adopted and apparently enforces an "encroachment" rule prohibiting competitive bidding and solicitation. The CID directed the Board to produce documents related to its adoption and enforcement of the encroachment rule as well as documents relevant to showing the relationship between the Board and the State of Texas (Pet. App. 3d-4d).

The Board refused to produce the requested documents, however, and commenced this action under 15 U.S.C. 1314(b) to have the CID set aside. Relying upon *Parker* v. *Brown*, 317 U.S. 341, the Board contended that it could not be compelled to comply with a CID because it acts as an agency of the State of Texas and is therefore exempt from the Sherman Act. The United States responded by filing a petition for enforcement under 15 U.S.C. 1314(a) (Pet. App. 1e-2e).

Although the district court acknowledged that courts ordinarily refuse to adjudicate claims of immunity or exemption from regulatory provisions in actions brought to enforce administrative subpoenas, it nonetheless held that the Board was immune from the Sherman Act and, therefore, could not be required to comply with a subpoena issued pursuant to the Antitrust Civil Process Act (*id.* at 3e, 4e-6e). The United States appealed this decision to the United States Court of Appeals for the Fifth Circuit and moved for summary reversal. The government asserted that the district court had incorrectly adjudicated the board's claim of immunity from the Sherman Act in a proceeding to enforce a CID rather than deferring the immunity issue for resolution on the basis of a complete factual record in the event that the United States filed an antitrust suit against the Board. The court of appeals summarily reversed (Pet. App. 1a).

The ruling of the court of appeals is in accord with several decisions of this Court, and the petition presents no issue warranting further review.

1. The Board's assertion that the decision below presents a question with respect to the scope of *Parker* v. *Brown* is incorrect. The government sought summary reversal in the court of appeals solely on the ground that the district court had erred in attempting to resolve an immunity question on an inadequate record in a CID proceeding. The court of appeals' decision presumably was based on that ground, and would not have any collateral estoppel effect if the government ultimately were to file a Sherman Act complaint and the Board or other parties were to assert a *Parker* v. *Brown* immunity defense.

2. An immunity question cannot be litigated in a proceeding to enforce a CID. This Court has consistently held that federal courts cannot adjudicate claims of immunity or exemption from regulatory provisions in actions brought to enforce administrative subpoenas. See, *e.g.*, *Federal Trade Commission* v. *Crafts*, 355 U.S. 9; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501. These cases expressly recognize the power of an administrative agency to gather sufficient facts during the investigative stage of a case to enable it to make an intelligent determination as to the scope of its jurisdiction. Indeed, this case is indistinguishable from *Federal Trade Commission* v. *Crafts*, *supra*. In that case, the court of appeals refused to enforce a Commission subpoena on the ground that the respondent insurance company was immune from federal regulation under the McCarran-Ferguson Act (244 F. 2d 882 (C.A. 9)), and this Court summarily reversed (355 U.S. 9).

The rule that immunity and other substantive defenses on the merits cannot be resolved in an action to enforce an investigatory subpoena is fully applicable to CID proceedings. First, *Parker* v. *Brown, supra,* the case upon which the Board's claim of immunity is premised, has never been applied to bar production of subpoenaed documents.[1] Furthermore, contrary to the Board's assertion (Pet. 10), Section 5(b) of the Antitrust Civil Process Act, 76 Stat. 551, 15 U.S.C. 1314(b), is not an explicit authorization for the district court to adjudicate an immunity claim in a CID enforcement proceeding.

The legislative history relating to the statutory language authorizing a court to modify or set aside a CID "upon any constitutional or other legal right or privilege" does not refer to defenses on the merits. Rather, it evidences a congressional intent to authorize a district court to determine whether the documents sought by the CID are privileged or otherwise protected against disclosure

[1]In any event, the immunity question that might be presented in an antitrust action against the Board could not be resolved on the basis of the sparse record in the CID proceeding. As the Board apparently acknowledges in its discussion of this Court's recent decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (Pet. 15-16), it is only after a detailed factual analysis of the degree of state involvement in an agency's anti-competitive practices that authorities charged with enforcement of the antitrust laws can determine whether a prospective defendant is immune from suit. The CID in this case specifically directed the Board to produce documents establishing its relationship with the State of Texas. Such documents would provide a more adequate record upon which to base a decision on the applicability of *Parker* v. *Brown.* See *United States* v. *Morton Salt Co.,* 338 U.S. 632; *Federal Maritime Commission* v. *Port of Seattle,* 521 F.2d 431, 434-435 (C.A. 9); *New Orleans Public Service, Inc.* v. *Brown,* 507 F.2d 160, 165 (C.A. 5); Securities & Exchange Commission v. *Brigadoon Scotch Dist. Co.,* 480 F.2d 1047, 1052-1054 (C.A. 2); *Amateur Softball Ass'n of America* v. *United States,* 467 F. 2d 312, 315-316 (C.A. 10).

by an evidentiary rule. Thus, the examples given during the Committee Hearings on this section to illustrate the types of documents that could not be obtained by means of a CID were documents protected by (i) the attorney-client privilege and (ii) the attorney work-product rule of *Hickman* v. *Taylor,* 329 U.S. 495. Hearings on S.167 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 51-55 (1961). Since the evidence sought by the CID was not "plainly incompetent or irrelevant to any lawful purpose" of the government in discharging its duties under the Sherman Act, *Endicott Johnson Corp.* v. *Perkins, supra,* 317 U.S. at 509, the court of appeals properly reversed the district court's denial of enforcement.[2]

3. The Board also asks (Pet. 16-19) this Court to determine whether the court of appeals acted properly in deciding the case on a motion for summary reversal. The Board contends that the court of appeals should have followed a summary calendar procedure that would have allowed more time for filing a responsive brief.[3] However, the court did not abuse its discretion in electing to follow a motion procedure in this case. Since the legal issue had already been decided by this Court, expedited consideration was in the public interest, and the Board suffered no prejudice by that procedure. Indeed, the Board did not request an extension of time for the filing of

[2]The Board has not alleged that compliance with the CID would be unreasonable or oppressive or that the United States has conducted its investigation in bad faith.

[3]The court of appeals did not shorten the time for filing a memorandum in opposition to the government's motion. The government's motion was mailed on July 25, 1975, and the memorandum in opposition was accordingly due on August 4, 1975. See Rules 27(a) and 26(c), Federal Rules of Appellate Procedure.

a response and in fact filed a comprehensive response to the government's motion. Moreover, the Board did not challenge the court of appeals' choice of procedure below. On the contrary, the Board agreed that the case did not require oral argument and urged the court summarily to affirm. Answer to Motion for Summary Reversal, pp. 2, 13.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.